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Paper No. 22

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JAN 30 2002

In re Application of :
Shirley et al. :
Application No. 09/187,661 :
Filed: November 5, 1998 :
Attorney Docket No. 5784-3 (PP01468.002) :

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the petition filed June 9, 2000, and supplemented January 3, 2002, to accord the above-identified application a filing date of November 6, 1998, instead of November 5, 1998.

The petition is **dismissed**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are NOT permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.10." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

37 CFR 1.10(d) states:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

As to (3), the record fails to include the necessary corroborating evidence. For the petition to be granted, the showing must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

The only evidence from the USPS which has been provided is an Express Mail label with a date-in of November 5, 1998. Evidence from the USPS may be an Express Mail Corporate Account Mailing Statement. A copy of Alston and Bird's Express Mail Corporate Account Mailing Statement for November of 1998 has not been provided.

Petitioner does not explicitly allege that any of the firm's records, such as logbook entries, were created within one business day after the mailing of the application. Rebecca Allen merely states that the logbook entries were made on the same day the application was mailed. Therefore, the firm's records may not be considered to be corroborating evidence under 37 CFR 1.10(d)(3).

Petitioner states the instant application was mailed the same time as application no. 09/188,051, which was given a filing date of November 6, 1998, by the PTO. Petitioner has supplied an express mail label for the other application which has a date-in of November 5, 1998. Petitioner alleges the filing date for application no. 09/188,051 supports a filing date of November 6, 1998, for the instant application. However, if the applications should be given the same filing date, then applicant has failed to establish why the filing date should not be November 5, 1998.

Petitioner is reminded that the issue fee for the instant application is due by February 20, 2002.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a request to change the address of record should be filed. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.

Further correspondence with respect to this matter should be addressed as follows:

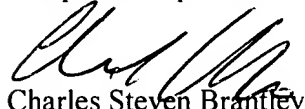
By mail: Commissioner for Patents
Box DAC
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By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

If a request for reconsideration is not timely submitted, the file will be forwarded to Publishing Division for further processing.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (703) 306-5683.


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